FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1935

No. 944

J. M. LEE, as Comptroller of the State of Florida,
Appellant,

against

JOHN P. BICKELL, GEORGE B. BUCHANAN,
ALFRED W. MANSFIELD, ET AL.,
Appellees.

BRIEF FOR APPELLEES

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 944

J. M. LEE, as Comptroller of the State of Florida,
Appellant,

v.

JOHN P. BICKELL, GEORGE B. BUCHANAN,
ALFRED W. MANSFIELD, ET AL,
Appellees.

On Appeal from the District Court of the United States, in and for the Northern District of Florida.

BRIEF FOR APPELLEES

Preliminary Statement

This case was advanced on motion of the Appellant under 28 USCA § 768, and counsel received ten days' advance notice of the assignment of the case for argument May 9, 1934. As this brief is being drafted, less than one week before date of argument, we have not received a copy of the brief which will be filed on behalf of the Appellant. That fact is mentioned in order that the Court may know the circumstances under which this brief was prepared, and thus make due allowance for the form in which the questions are treated, which necessarily is somewhat different from that which would be employed in answering the Appellant's brief.

Citation of Report of Opinion of the District Court

In 5 F. Supp. 720 (Advance Opinions, Vol. 5—No. 12, of March 26, 1934) there is reported the opinion rendered by the District Court in connection with the granting of the interlocutory injunction herein.

Statement of the Case

On December 11, 1933, the Appellees as plaintiffs, non-residents of Florida, constituting the members of the brokerage firms of Thomson & McKinnon and Fenner, Beane & Ungerleider (now Fenner & Beane), filed their bill in equity against J. M. Lee, as Comptroller of the State of Florida, in the District Court of the United States, in and for the Northern District of Florida, and thereby sought to restrain certain threatened enforcement and operation of the Florida Documentary Stamp Tax Act, Chapter 15,787, Laws of Florida 1931, Ex. Sess., by restraining the Comptroller in such enforcement of the Act, on the ground, among others, that same violated certain specified provisions of the Constitution of the United States. (R. 5-38.)

On presentation of the bill to the late Honorable Wm. B. Sheppard, Judge of the District Court, an order was made December 11, 1933, granting a temporary restraining order to be effective until the hearing and determination of the interlocutory injunction prayed for, directing the defendant to show cause why an interlocutory injunction should not issue, and calling to his assistance to constitute a three-Judge Court under Section 266 of the Judicial Code, the Honorable Nathan P. Bryan, Judge of the United States Circuit Court of Appeals for the Fifth Circuit, and the Honorable Alexander Akerman, Judge of the District Court of the United States, in and for the Southern District of Florida. (R. 1-3.)

After due notice to the defendant and to the Governor and the Attorney General of Florida (R. 4-5), the plaintiffs pressed their application for interlocutory injunction and submitted and argued the same before the three-Judge Court on December 21, 1933, at Pensacola, Florida, following which the Court's above mentioned opinion was made and the interlocutory injunction granted. (R. 53-54.) Thereafter the cause was heard by said Court in Pensacola on March 10, 1934, on a final hearing at which the cause was presented and argued on the Stipulation of Facts (R. 59-91). On that day the Court made its final decree in the case granting

the permanent injunction as prayed for in the bill, in which it adopted as facts of the case those set forth in the Stipulation and those found in its previous opinion, and adopted as its conclusions of law those set forth in said previous opinion, excepting the language of the previous opinion in which the Court had taken the view that the Act applied to a certain marginal customer's agreement, as to which the previous opinion was not followed in the final decree.

Therefore, for the facts of this case, notwithstanding such statement thereof as may be contained in a Statement of the Case in the brief for Appellant, we respectfully refer the Court to the facts as stated in the District Court's opinion and in the Stipulation of Facts.

BRIEF OF ARGUMENT.

POINT ONE—The case is one of which the Federal Court had jurisdiction, and is within Section 266 of the Judicial Code.

Schlosser v. Welsh, 5 F. Supp. 993.

City of Hutchinson v. Beckham, 118 F. 399 (C. C. A. 8th).

Jewel Tea Co. v. Lee's Summit, Mo., 198 F. 532 (D. C., Mo.).

Grandin Farmers' Co-op. Elevator Co. v. Langer, 5 F. Supp. 425. (D. C., N. Dak.)

Fisher v. Brucker, 41 F. (2d) 774 (D. C., Mich.)

Louisville & Nashville Railroad Co. v. Garrett, 231 U. S. 298.

Graniteville Mfg. Co. v. Query, 283 U. S. 376.

McCormick & Co. v. Brown, 52 F. (2d) 934 (C. C. A. 4th).

POINT TWO—The case is within the equity jurisdiction of the Court.

Dows v. Chicago, 11 Wall. 108.

Union Pacific Ry. Co. v. Cheyenne, 113 U. S. 516.

Ogden v. Armstrong, 168 U. S. 224.

Ex parte Young, 209 U. S. 123.

Greene v. Louisville & I. R. Co., 244 U. S. 499.

Henrietta Mills v. Rutherford County, 281 U. S. 121.

City of Hutchinson v. Beckham, 118 F. 399 (C. C. A. 8th).

POINT THREE—The Florida statute with respect to stamp taxes on transfers of stocks is not subject to the construction placed thereon by the Florida Comptroller.

State ex rel. Packard v. Cook, (Fla.), 146 Sou. Rep. 223.

Nelson v. Watson (not yet reported).

State ex rel. Rogers v. Sweat, (Fla.), 152 Sou. Rep. 432.

Schwab v. Doyle, 258 U. S. 529.

Bowers v. New York & A. Lighterage Co., 273 U. S. 346.

Brewster v. Gage, 280 U. S. 327.
Graniteville Mfg. Co. v. Query, 283 U. S. 376.
People ex rel. Hatch v. Reardon, 204 U. S. 152 (and 184 N. Y. 431, 77 N. E. Rep. 970).

POINT FOUR—The Florida Act, if construed as contended for by the Appellant, is violative of the Constitution of the United States.

1. The taxation would deprive Appellees of property without due process of law.
   In re. Paul's Estate, 165 N. Y. S. (Surr.) 413.
   People ex rel. Hatch v. Reardon, 204 U. S. 152.
   Graniteville Mfg. Co. v. Query, 283 U. S. 376.
   Frick v. Pennsylvania, 268 U. S. 486.
   First National Bank v. Maine, 284 U. S. 312.
2. The taxation would deprive Appellees of liberty without due process of law.
   Allgeyer v. Louisiana, 165 U. S. 578.
   St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346.
3. The taxation would constitute a burden on interstate commerce.
   Western Union Teleg. Co. v. Foster, 247 U. S. 105.
   Ware & Leland v. Mobile County, 209 U. S. 405.
4. The Act is void by reason of its excessive criminal penalties.
   Ex parte Young, 209 U. S. 123.

POINT FIVE—The Florida Act, if construed as contended for by the Appellant, is violative of the Constitution of the State of Florida.

1. The taxation would deprive Appellees of liberty and property without due process of law.
2. The Act is a denial of the State constitutional guaranty of equal rate of taxation.
   St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346.
   People ex rel. Hatch v. Reardon, 184 N. Y. 431, 77 N. E. Rep. 970 (and 97 N. Y. S. 535).
   Jordan v. Duval County, 68 Fla. 48, 66 Sou. Rep. 298.

Graham v. West Tampa, 71 Fla. 605, 71 Sou. Rep. 926.

Sparkman v. State, 71 Fla. 210, 71 Sou. Rep. 34.

Camp Phosphate Co. v. Allen, 77 Fla. 341, 81 Sou. Rep. 503.

Louisville & N. R. Co. v. Amos, 98 Fla. 350, 123 Sou. Rep. 745.

Walter C. Hardesty, Inc. v. Town of Holly Hill, 100 Fla. 1130, 131 Sou. Rep. 134.

3. The Act contains more than one subject and the subject of the Act is not expressed in the title.

Smith v. Chase, Sheriff, 91 Fla. 1044, 109 Sou. Rep. 94.

POINT ONE.

The case was one of which the Federal District Court had jurisdiction, and was a case in which the interlocutory injunction application and final hearing were required to be presented to the statutory three-judge court under Section 266 of the Federal Judical Code.

The statement of points upon which Appellant intends to rely (R. 100-103) does not refer directly to this point, but the Tenth, Eleventh and Twelfth Points are of a general nature, to the effect that the Court erred in granting the permanent injunction, and in not dismissing the bill, and in granting the final decree, under which the questions raised by this point may be argued by Appellant.

As shown by Paragraph 2 of the bill (R. 8) the basis of Federal jurisdiction there alleged was that the cause is one of a civil nature in equity, wherein the amount in controversy, exclusive of interest and costs, exceeds the sum and value of $3,000.00, and which arises under the Constitution of the United States, and in which there is diversity of citizenship.

The diversity of citizenship is disclosed by Paragraph 1 of the bill (R. 6-8). This is supported by Paragraph 2 of the Stipulation of Facts (R. 60), to the effect that all of the plaintiffs are citizens and residents of states and countries other than the State of Florida, and by the defendant's admission in Paragraph 1 of his answer (R. 40), that he is a citizen of the State of Florida, and resides in the City of Tallahassee in said State (in the Northern Federal Judicial District of the State).

The provisions of the Constitution of the United States upon which the rights of the plaintiffs are predicated, are specifically alleged in Paragraph 16 of the bill (R. 21). That the constitutional or Federal questions raised are substantial is evident from the circumstances of the case, the allegations of the bill and the ruling and action of the District Court thereon.

It further appears from the bill that the object sought to be accomplished by the suit was that the freedom and liberty of the plaintiffs to conduct their said businesses should remain unhampered and unmolested by the allegedly unconstitutional taxation. By thus seeking redress from deprivation, under color of the State statute, of their rights, privileges and immunities secured to them in such respect by the Constitution of the United States, they presented a cause of which the Federal District Court had jurisdiction, irrespective of the amount in controversy. (28 USCA, § 41, Subdivision 14.)

An instance of a recent application of the ground of jurisdiction last mentioned, which was made by a three-Judge Court convoked in South Dakota, is *Schlosser v. Welsh*, 5 F. Supp. 993, 996 (Advance Opinions, Vol. 5—No. 15, of April 16, 1934).

The requisite amount in controversy, however, affirmatively appears. In addition to the formal allegation thereof, as contained in said Paragraph 2 of the bill, it was shown by Paragraphs 19, 20, 21 and 22 of the bill (R. 23-24) that the suit was one in which the plaintiffs were seeking to save their Florida businesses from extinguishment, and that the existence of such businesses and the value thereof to the plaintiffs were at stake, and that such value was greatly in excess of the jurisdictional amount. Relying on these features as constituting and determining the amount in controversy, the bill made no allegations with respect to the amount of the taxes involved in the case. With leave of the Court, an amendment to the bill was filed (R. 51-52), by which it was alleged that more than $3,000.00 in amount of taxes was involved as to each of the plaintiff partnership firms, and that the value of the business and property which the original bill alleged would be lost through the enforcement of the Act would amount to more than $3,000.00 as to each of the plaintiffs.

If the taxes which are sought to be collected, and the collection of which is prevented by the injunction, constitute the amount in controversy, then by such amendment it is

shown that the requisite jurisdictional amount is present. In addition to that, however, there is the value of the businesses of the plaintiff firms and the injury which they would sustain through the enforcement of the tax, likewise alleged in a sufficient amount, which is the true value or amount in controversy in a case of this kind.

City of Hutchinson v. Beckham, 118 F. 399 (C. C. A. 8th).

Jewel Tea Co. v. Lee's Summit, Mo., 198 F. 532 (D. C., Mo.)

Grandin Farmers' Co-op. Elevator Co. v. Langer, 5 F. Supp. 425 (D. C., N. Dak.)

In *Grandin Farmers' Co-op. Elevator Co. v. Langer, supra*, an interlocutory injunction was granted by a three-Judge Court convoked under Section 266 of the Federal Judicial Code, on application of a number of owners and operators of grain elevators, restraining officers of the State of North Dakota from enforcing a statute of that State affecting their business, and which was claimed to be in violation of the Federal Constitution. It was there contended by the defendants that the sufficient jurisdictional amount was not made to appear. The Court, however, took the view that the object of the suit was to protect the business which would be affected by enforcing the statute in the manner complained of, and bottomed its opinion on that point upon numerous decisions of this Court, as shown in the following quoted language, appearing on Page 426:

"The bill asserts that the action involves more than $3,000 exclusive of interest and costs. It is obvious that what the complainants seek to protect is the right to operate their elevators and to conduct their business free of the restrictions complained of. The value of that right is the amount in controversy.

" 'Complainant sets up a right to maintain and operate its plant and conduct its business free from wrongful interference by defendant. This right is alleged to be of a value in excess of the jurisdictional amount, and at the hearing no question seems to have been made but

that it has such value. The relief sought is the protection of that right, now and in the future, and the value of that protection is determinative of the jurisdiction.' Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co., 239 U. S. 121, 126, 36 S. Ct. 30, 32, 60 L. Ed. 174. See, also, Scott v. Donald, 165 U. S. 107, 115, 17 S. Ct. 262, 41 L. Ed. 648; McNeill v. Southern Railway Co., 202 U. S. 543, 558, 26 S. Ct. 722, 50 L. Ed. 1142; Hunt v. N. Y. Cotton Exchange, 205 U. S. 322, 336, 27 S. Ct. 529, 51 L. Ed. 821; Bitterman v. Louisville & Nashville R. R., 207 U. S. 205, 225, 28 S. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693; Berryman v. Board of Trustees of Whitman College, 222 U. S. 334, 345, 32 S. Ct. 147, 56 L. Ed. 225."

By the Stipulation of Facts (R. 60-61) it is established that the taxes involved in this case amount to more than $3,000.00 as to each of the plaintiff partnership firms and also that the value of the business of each firm which by Paragraphs 19, 20, 21 and 22 of the original bill, it is alleged will be lost through enforcement of the Act in the respects complained of, is in excess of the jurisdictional amount. Furthermore, by Paragraph 5 of the Stipulation (R. 61) it is stated to be the testimony of the plaintiffs in this case that the enforcement of the Act, as threatened, will result in injury in excess of the jurisdictional amount to each of the plaintiff firms, and by a preliminary paragraph in the Stipulation (R. 59) it is agreed that the matter in the Stipulation set forth as the "testimony" of a party shall constitute evidence in the case. There is no stipulated fact or other evidence to contradict or detract from the "testimony" just mentioned. It appears, therefore, that the required amount in controversy is affirmatively shown by the bill as amended, and proved beyond question by the Stipulation of Facts.

The case is one which, under Section 266 of the Judicial Code, required the application for an interlocutory injunction and final hearing to be heard by a three-judge statutory Court, as therein provided for. The object of the suit was to restrain the action of a State officer, to-wit: the defendant Comptroller of the State of Florida, in the enforcement of

a State taxation statute (Chapter 15787, Laws of Florida, 1931, Ex. Sess.) on the ground, among others, of its unconstitutionality under the United States Constitution.

The nature of the contention of unconstitutionality as made in the bill was that the statute, properly construed, did not impose a tax on the papers and documents as to which it was sought to be enforced, and that if construed as imposing such tax, the statute abridged Federal constitutional privileges and immunities of the plaintiffs. The ground of unconstitutionality of a State statute was presented in the identical manner in the case of *Fisher v. Brucker*, 41 F. (2d) 774, in a suit to restrain enforcement of a Michigan inheritance tax upon a certain subject of taxation. There a statutory court under Section 266 of the Judicial Code expressly found that the case was one within the Federal statute and granted the relief sought. While the Fisher case was not appealed to the Supreme Court, it was through inadvertence appealed to the Circuit Court of Appeals, out of which Court it was dismissed (49 F. (2d) 759) upon that Court viewing the case as one properly within Section 266, and, therefore, appealable to the Supreme Court.

It is significant that in the Fisher case the basis upon which the injunction was granted was that the statute properly construed did not impose a tax on the subject in question, and, therefore, that the constitutionality question was not inquired into. The Court discussed that feature of the case and followed the decision of this Court to such effect in *Louisville & Nashville Railroad Co. v. Garrett*, 231 U. S. 298, 303, 304, where this Court held that in a case before a three-judge Court under Section 266 of the Judicial Code, the Court had jurisdiction to determine local questions as well as the Federal constitutional question.

Also, in *Graniteville Mfg. Co. v. Query*, 283 U. S. 376, this Court affirmed a decree of such a statutory three-judge Court in part granting an injunction restraining enforcement of a stamp tax statute of the State of South Carolina on certain promissory notes made outside that State. An examination of the opinion in that case rendered by the District Court (44 F. (2d) 64) discloses that there, as in this case, the

contention was that the notes were not within the taxing statute, but that if the Act were construed to tax them, it was then rendered unconstitutional.

The applicability of Section 266 of the Judicial Code to this case is further shown by the fact that under the Florida statute the State Comptroller is set up as the administrator of the Act, and is, therefore, the equivalent of an administrative board under the statute, whose orders as complained of herein were sought to be enjoined. In *McCormick & Co. v. Brown*, 52 F. (2d) 934, the Circuit Court of Appeals of the Fourth Circuit, in deciding that a single District Judge was without jurisdiction to entertain a cause on application for injunction by reason of the applicability and requirements of Section 266 of the Judicial Code, held that a single individual charged with the administration of a statute, was the equivalent of an administrative board or commission, within the meaning of Section 266, saying (at page 937):

> "And it is settled that a court of three judges is required not only when the constitutionality of the state statute is involved, but also when the constitutionality of an order of a state administrative board or commission, purporting to be authorized by state statute, is drawn into question. *A single individual, such as the prohibition commissioner of the State of West Virginia, may constitute a state administrative board or commission within the meaning of the act.*"

POINT TWO.

The case presented by the bill was one within the equity jurisdiction of the Court.

In the Statement of the Points upon which the Appellant will rely (R. 100), the first point assigned is that the District Court failed to find that the plaintiffs had a complete and adequate remedy at law for redress against enforcement of the Act complained of. We anticipate that Appellant's contention there will be that because an action may lie to recover a tax illegally imposed and collected, there was no equity on which the relief sought in this suit could be granted.

While mindful of the many authorities which state the general rule to be that a Court of equity will not restrain collection of taxes on the ground of their illegality or unconstitutionality, and recognizing the policy upon which such rule is founded, nevertheless, we contend it is equally clear and well settled that where such equitable relief is sought, under circumstances which bring the case under a recognized head of equity jurisdiction, as where the threatened injury would result in a multiplicity of suits, or otherwise would cause irreparable damage and injury, equitable relief will be granted. The basis of the suit and the ground of its equity in such a case is not the illegality or unconstitutionality of the tax, but the basis of the suit is the effect of the taxation, which through the multiplicity of suits and the irreparable injury gives rise to the cause of action upon which the relief is sought.

Dows v. Chicago, 11 Wall. 108.
Union Pacific Ry. Co. v. Cheyenne, 113 U. S. 516.
Ogden v. Armstrong, 168 U. S. 224.
Ex parte Young, 209 U. S. 123.
Greene v. Louisville & I. R. Co., 244 U. S. 499.
Henrietta Mills v. Rutherford County, 281 U. S. 121.
City of Hutchinson v. Beckham, 118 F. 399 (C. C. A. 8).

The showing made here was that under the Comptroller's construction, the nature of the tax complained of was such that it would require a tax payment in the form of the affix-

ation and cancellation of documentary stamps on some papers connected with each purchase or sale of stock made on a foreign stock exchange, where the purchase or sale originated in a Florida branch office of the brokerage firms; that hundreds of such transactions are handled daily by each of the firms; that the threatened imposition of the tax would cause serious impairment if not complete destruction of the Florida business; that the penalty for each violation would be a fine not to exceed $200.00, or imprisonment not to exceed ninety (90) days, or both, in the discretion of the Court; and that each transaction would constitute a separate violation.

Under those circumstances, it is evident that the enforcement of the Act would cause irreparable injury to the appellee brokers through a loss of business not in anywise measurable by the amount of the taxes themselves. An action to recover back certain of such taxes which had been paid, could in no sense be an adequate or full or complete remedy for the impairment and loss of business which meanwhile would occur, because of the deterring effect of the requirement to continue the payment of such taxes during the year or more which it might take to recover in such an action. Therefore, it is no help for the Comptroller to say (R. 74) that if an action at law were brought to recover back taxes paid, the taxes which should be collected by him during the pendency of such action would be held available for return depending upon the outcome of the case.

Furthermore, it is apparent that a multiplicity of suits would be required to recover taxes paid, in that before any action could be completed for recovery of taxes which had been paid prior to its commencement, more taxes would have been paid necessitating a further suit, and so on in an endless chain of litigation.

The Appellant may refer to the statement in paragraph 30 of the Stipuation (R. 75) to the effect that stamps may be purchased in quantities in advance of their use, as a circumstance for refuting the holding of the District Court (R. 56) that the payment of each tax under the Act is a separate transaction, as a result of which recovery of pay-

ments at law would require multiplicity of suits. That the purchase of stamps in advance of their use is not a payment of taxes under the Act is a proposition too obvious to require reenforcement by argument. Certainly, one who purchased such stamps and still retained them in his possession could not maintain an action to recover their price. The tax is paid when a stamp is affixed and cancelled on some document taxable under the Act, or claimed by the taxing officials to be taxable thereunder.

An additional ground of equity, resulting from the circumstances of the case, is that the penalties provided for the violations, of which there would be hundreds daily, would make it impossible for the appellee brokers to maintain their business in the Florida offices with any degree of efficiency, if at all, in that their employees would be subject to multiple arrests, prosecutions, fines and imprisonments. It is no answer to that to say (as the Comptroller in his answer and in the Stipulation of Facts (R. 75) has said) that enforcement of the Act would not be carried out in an unreasonable, arbitrary or oppressive manner, since the very duty imposed upon him by the statute to administer and enforce the same would, under any conscientious and proper discharge of his duties in that respect, compel an enforcement of the violations which could not fail to have the result indicated.

It is to be noted that here the Comptroller did not offer to waive payment of such taxes as would become payable, pending an action brought to recover back certain taxes as a test of the legality and constitutionality thereof. Therefore, if the appellee brokers had paid certain taxes and filed an action to recover them as having been illegally and unconstitutionally collected, they would have been faced with the dilemma of violating the law by failing to comply with the statute in the many daily transactions which would occur during the pendency of the action, with the result that if unsuccessful they or their employees would find themselves subject to an accumulation of penalties which, if enforced against them, could result in sentence of imprisonment for hundreds of years and for payment of fines ranging into hundreds of thousands of dollars, or they could pay, or re-

quire their customers to pay, the separate tax on all of the ensuing and subsequent transactions, which procedure would result in the loss of business for which the return of the particular tax money sued upon and even of that paid subsequently thereto, could in no measure compensate them or afford any full or complete redress. See *Ex parte Young*, *supra*, 209 U. S. 123.

POINT THREE.

The Florida statute with respect to stamp taxes on transfers of stocks is not subject to the construction placed thereon by the Florida Comptroller.

In the Appellant's statement of the points on which he intends to rely, the Second, Third, Fourth, Fifth, Sixth and Seventh Points (R. 100-101) are to the effect that the District Court erred in enjoining the Appellant from enforcing the tax statute as to particular papers or documents which in such points are described by reference to the Stipulation of Facts.

As we view the case, the controlling questions affect alike each of the papers or documents referred to in the Appellant's Points Two to Seven, inclusive, and they will, therefore, be dealt with together in this brief.

The statute in full is attached as an Appendix to this brief. Reference is now made thereto to show that by Section One it imposes an excise tax on certain acts and on certain documents, and by Schedule A of Section One the various subjects of the excise tax are set forth in separate paragraphs. In the first paragraph of Schedule A it is specified that the tax shall be upon certain documents, to-wit, bonds and like certificates of indebtedness which are issued in the State. In the second paragraph the excise tax is imposed on certificates of stock which are issued in the State. The third paragraph of Schedule A (and that is the one under which the tax contended for by the Comptroller here is presumed by him to be imposed) an excise tax is placed upon the sale and transfer of stocks. In the fourth paragraph the tax is extended to promissory notes, non-negotiable notes, written obligations to pay money and assignments of salaries, wages or other compensation, and as to those particular items, the tax is made to apply to such as are made, executed, sold, delivered, transferred or assigned in the State. Further paragraphs impose the tax on instruments transferring an interest in real estate, on certain corporation voting proxies, and on powers of attorney.

The third paragraph of Schedule A, relating to transfers of stocks, properly construed, imposes an excise tax on stock transfers, and its mention of "memoranda of sales or deliveries of***" can mean only that such memoranda in certain instances shall be the vehicle for the stamp, which is the tax imposed on the transfers to which the memoranda relate.

For instance, it is provided that where the evidence of transfer is shown only by the books of the corporation, the stamp shall be placed on the books, but corporation books as such are not made the subject of an excise tax under the Act. It is only when the book becomes an evidence and the only evidence of a stock transfer that the stamp must be placed on the book, thus taxing the transfer. Similarly, it is provided that where the change of ownership is by transfer of the certificate itself, the stamps shall be placed on the certificate. In the instance of a transfer of the certificate which is thus stamped, there might be any number of incidental memoranda or papers which would refer to the transfer, and yet no provision is made by the Act for a separate excise tax on them.

Finally, the Act provides that where the transfers are made in two particular manners ("in case of an agreement to sell or where the transfer is made by delivery of the certificate assigned in blank") the *seller* must deliver to the *buyer* a bill or memorandum of sale and the stamp shall be affixed to that bill or memorandum of sale. It is provided that such a bill or memorandum of sale (that is the one required in the two instances mentioned) shall contain certain information, to-wit: the date thereof, the name of the *seller*, the amount of the sale, and the matter or thing to which it refers. Thus it appears that the occasions on which a bill or memorandum of sale is to bear the stamp are those instances where, because the transfer is by a certificate assigned in blank, or is by a contract to sell, the lack of tangible evidence of the taxable transfer creates the necessity for requiring such transfer to be accomplished by an obvious and formal memorandum of sale which can best evidence those particular transfers, and, therefore, form the vehicle to carry the stamp, and thus enable the administrator of

the Act to more efficiently enforce the same. It is obvious that when a memorandum of sale is so stamped, the tax imposed is the excise tax on the transfer, the transfer being the taxable event.

The limit which necessity places on the length of this brief prevents us from outlining in detail the stock transfer transactions conducted by the appellee brokers on the New York Stock Exchange and the other Exchanges outside the State of Florida on which such transfers are made by them for their Florida customers. The facts relating thereto are set forth in detail in the Stipulation of Facts. The nature of the business generally is shown by paragraph 1 of the Stipulation (R. 59-60). The manner of handling such transactions on the New York Stock Exchange is shown by paragraph 6 of the Stipulation (R. 61) to be substantially similar to that employed by Appellees on other Stock Exchanges. The procedure for a purchase of stock on the New York Stock Exchange, for a Florida customer, is set forth in detail in paragraph 7 of the Stipulation (R. 62-65), and as to a sale of stock, in paragraph 8 thereof (R. 66-68).

We respectfully direct the Court's attention, however, to certain of the facts as contained in said Stipulation, namely, that all purchases and sales are made at the customer's risk and for his account by the brokers acting as the representative of the customer, and whether the broker is called "broker" or "agent" is immaterial since the detailed statement of the transactions shows that the representation is in fact one of agency, wherein in making a sale or purchase for the customer on the foreign exchange, the broker acts as agent for the customer who is his undisclosed principal, and there (outside the State of Florida) contracts for the sale or purchase of stock, and completes the transaction, dealing with another broker or brokerage firm, who in turn is acting as an agent for an undisclosed principal. All transactions are completed by payment and delivery, made outside the State of Florida. In the transactions in question, in the case of a purchase of stock for a Florida customer, no purchase thereof is made in the State of Florida. In the case of a sale of stock for a Florida customer, no contract for its sale is

made in the State of Florida, and no sale, or delivery to the purchaser thereof, is made in the State of Florida.

The Appellant will contend that the various incidental memoranda exchanged between the customer and the employees of the Florida branch offices of the appellee firms, which refer or relate to purchases or sales of stock made for them without the State, are taxable under the above specified portion of the statute, notwithstanding that the Appellant no doubt will concede that the extra-territorial *transfer* is not taxable under the Act. More specifically stated, the position of the Appellant in this case will be that regardless of the fact that the transfer of stock is one made outside the State, and, therefore, not within the reach of the excise tax Act, those written communications between the broker and customer, which are only incidental to the foreign transfer, should be construed to be memoranda of a sale, or memoranda of delivery, and as such, separate subjects of the excise tax.

The unsoundness of that position is demonstrated first, by the wording of the Act as pointed out above; secondly, by the concession which the Appellant has made in paragraph 17 of the Stipulation of Facts (R. 70) that not more than one of such papers or "memoranda" would be taxable, though a number of them might be utilized in connection with a foreign purchase or sale, for upon his conceding that point, it becomes apparent that it is the transfer that is the basis of the tax, and the Appellant thereby in effect concedes that the nature of the incidental papers is not the basis for a tax on them; thirdly, by the fact that no one of such incidental papers would be taxable, even under the Appellant's construction, unless the purchase or sale transaction to which it relates is actually consummated; fourthly, because the amount of the tax which the Comptroller would impose on such incidental papers would depend not upon what might be contained thereon, but upon the number and face value of the shares of stock sold or purchased outside the State; and finally, because such a construction of the statute, even if the view be taken that it is possible of that construction, would be forced and strained and an interpretation resolving

a patent ambiguity unaided by any indication that such was the objective intent of the Legislature.

The statute has been before the Supreme Court of Florida for construction in a limited number of cases.

State ex rel. Packard v. Cook, ...Fla.,....., 146 Sou. Rep. 223 (1933).

Nelson v. Watson (decided November 28, 1933, opinion not yet reported).

State ex rel. Rogers v. Sweat, ...Fla....., 152 Sou. Rep. 432 (1934).

These have not involved the paragraph relating to stock transfers. They leave no doubt, however, as to the principles which shall be applied in construing the Act, and they are clear that if the wording of the Act casts doubt upon the taxability of an instrument, that doubt must be resolved in favor of exemption, that a tax cannot be imposed thereunder in the absence of clear language for the purpose, and that the person upon whom it is sought to impose the burden of a tax shall be given the benefit of any doubt in that regard.

In *State ex rel. Packard v. Cook, supra*, 146 Sou. Rep. 223, the Court was concerned with an ambiguity as to the taxability of a written assignement of wages of less than $100.00 in amount, under the fourth paragraph of Schedule A taxing promissory notes, non-negotiable notes, written obligations to pay money, etc. The Florida Court, speaking through Mr. Chief Justice Davis, there said at Page 224:

> "At the outset, it must be conceded that the correct rule of construction to be applied in such controversies is that, if there is any doubt as to the liability of an instrument to taxation under the act, the construction is in favor of exemption, because a tax cannot be imposed without clear and express words for that purpose. United States v. Isham, 17 Wall. 496, 21 L. Ed. 728.

> "The well-established rule is that, where there is an ambiguity in the language of a statute imposing a tax, and that ambiguity raises a doubt as to the legislative intent, the persons upon whom it is sought to impose the burden are to be given the benefit of the doubt, because a tax, to be sustained in any given case, must come clearly within the letter of the statute. Edwards, Internal Revenue Collector, v. Wabash Ry. Co. (C. C. A.) 264 F. 610; 33 C. J. 285; 25 R. C. L. 1092. See, also, State v. Beardsley, 84 Fla. 109, 94 So. 660."

In the *Nelson v. Watson* case the Florida Court held a certain document taxable as being a written obligation to pay money under the fourth paragraph of Schedule A.

In the third case, *State ex rel. Rogers v. Sweat, supra,* the Court held that the Act did not tax assignments of mortgages when the certificate of indebtedness was otherwise shown in a separate instrument. There again the question concerned written obligations to pay money, taxed under the fourth paragraph of Schedule A. As to the recognized rule of construction applicable to this particular statute, however, the Court in an opinion by Mr. Justice Buford, at Page 433, said:

> "It is conceded that the well-established rule is that where there is an ambiguity in the language of a statute imposing a tax and that ambiguity raises a doubt as to the legislative intent, the persons upon whom it is sought to impose the burden are to be given the benefit of the doubt because a tax to be sustained in any given case must come clearly within the letter of the statute. See Edwards, Internal Revenue Collector, v. Wabash R. R. Co. (C. C. A.) 264 F. 610; 33 C. J. 285; 25 R. C. L. 1092; and State v. Beardsley, 84 Fla. 109, 94 Sou. 660. See, also, Nelson v. Watson (Fla.) —— So. ———, decided November 28, 1933."

The foregoing is in accord with the rule of construction as applied under such circumstances by this Court.

Schwab v. Doyle, 258 U. S. 529, 536.
Bowers v. New York & A. Lighterage Co., 273 U. S. 346, 350.

The case of *Schwab v. Doyle, supra*, involved a Federal estate tax. The Court, in referring to the construction urged by the defendant Collector of Internal Revenue, there said (258 U. S. at 536):

> "But granting the contention of the defendant has plausibility, it is to be remembered that we are dealing with a tax measure and whatever doubts exist must be resolved against it."

The particular incidental papers or "memoranda" as to which the enforcement of the Act is threatened, as specified in Appellant's Second to Seventh Points (R. 100-101) are as follows:

Exhibit 3 to the Stipulation of Facts (Appellant's Point Two) is shown on Page 78 of the Record. This is a telegraphic notice sent by the New York office of an appellee brokerage firm to its Florida branch office, showing the consummation of a purchase of stock on an order or request of a Florida customer. The nature and function of that notice is shown by the Stipulation, sub-paragraphs (f) and (g) of paragaph 7 (R. 63-64), to be a message sent by the Florida branch office over the firm's private wire, advising or confirming that the transaction was theretofore completed on the New York Stock Exchange, and it is shown that in some instances the written message is not given to the customer.

Exhibit 6 to the Stipulation of Facts (Appellant's Point Three) appears on Page 79 of the Record. This is shown by sub-paragraph (n) of paragraph 7 of the Stipulation (R. 65) to be a form of receipt which the New York office mails to the Florida customer with stock which they have purchased and are forwarding to him, and which the customer is requested to sign and return by mail to the New York office of the firm. Our position there is that such receipt has no direct connection with the purchase of stock

which was previously made for the customer outside the State, and that the broker receives delivery in New York as the agent for the customer, and in forwarding the same to the customer the broker, that is, the customer's agent, is merely performing messenger service.

Exhibit 7 to the Stipulation of Facts (Appellant's Point Four) appears on Page 80 of the Record. This is shown by sub-paragraph (b) of paragraph 8 of the Stipulation (R. 66) to be an order or request of a Florida customer to the appellee brokers to sell certain stock for him on the New York Stock Exchange. By reference to the full explanation of such an order as made in the case of a purchase (R. 62) it appears that it is nothing more than a delegation of authority to the brokers to sell the stock for the customer, if a sale is possible of execution on the terms specified, and is a direction which may or may not bring about a sale of the stock; that in the event a sale results therefrom the contract for the sale and the sale itself both take place outside the State of Florida at a time subsequent to the authorization, and that it is not essential that the order be written or in any particular form. An order made orally will serve the purpose.

Exhibit 9 to the Stipulation of Facts (Appellant's Point Five) is shown on Page 81 of the Record. This appears by sub-paragraph (f) of paragraph 8 of the Stipulation (R. 66-67) to be a telegraphic communication from the New York office of the brokers to the Florida branch office conveying the information that a requested sale of stock for a Florida customer has been made on the New York Stock Exchange. This paper, as in the case of Exhibit 3 discussed above, may or may not be delivered to the customer, who sometimes is notified orally or by telephone or not notified at all through the branch office. The Stipulation shows that formal notice of the transactions is always mailed from the New York office of the firm to the Florida customer on the day that the transactions take place. (R. 67).

Exhibit 12 to the Stipulation of Facts (Appellant's

Point Six) is shown on Page 82 of the Record. This is shown by paragraphs 9 and 10 of the Stipulation (R. 68-69) to be a form of the receipt which is given by a Florida branch office to a customer who deposits money or stocks with the appellee brokers through a branch office. It is the Appellant's contention that when such receipt is given for a deposit of stocks it is taxable under the Act as a "memorandum of delivery." We submit that the relation between the parties, as shown by the Stipulation of Facts, precludes any such construction, in that the manual delivery of the stocks by a principal to his agent to be dealt with by the agent for the principal is not a transfer of title thereto.

Exhibit 14 to the Stipulation of Facts (Appellant's Point Seven) appears on Page 84 of the Record, and is shown by paragraphs 12, 14 and 16 of the Stipulation (R. 69-70) to be an example of the record of trades of a Florida customer, which is kept in a Florida branch office. The Stipulation discloses that the purchases and sales indicated thereon are those which the firm has made on the customer's behalf outside the State of Florida; that the complete record of all transactions and debit and credit items, with balances computed daily, is kept in the New York offices of the firms, according to which all statements and remittances are made, whereas the corresponding Florida approximations are for the convenience of the branch office operatives and of the customer, to the extent that such records of the position and transactions of the customer may be relied on, subject to confirmation from the complete records as kept in the New York offices of the firms. It is obvious that these records of trades are notations made after the foreign transaction has been made by the broker for the customer, and do not purport to give the names of the parties to whom the customer's stock has been sold or from whom stock has been purchased for the customer, but are merely such notations with respect to transactions as the customer might jot down in a personal notebook for future reference.

The Appellant's contention here then will be that the

various papers above described are taxable as memoranda of sales of stock or as memoranda of deliveries of stock, but as above noted, they do not fit the description or fulfill the purpose of the memoranda of sales which, by the Florida Act, are required to bear an excise tax *as the tax on the transfer to which they relate.*

Statutes in other jurisdictions also impose a tax on memoranda of sales. In the Federal statute (Sub-division 3 of Schedule A of Section 800 of the Revenue Act of 1926 as amended by the Revenue Acts of 1928 and 1932, U. S. C., Title 26, §901) a tax is imposed on

> "* * * all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the shares or certificates * * * whether made upon or shown by the books of the corporaton or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale * * *".

The meaning of "memoranda of sales" as used in the above quoted provision appears clearly from Article 36 of Regulations No. 71 issued by the Bureau of Internal Revenue. That reads as follows:

> "Memoranda of sales. — Every person who makes *an agreement to sell* or transfers title to shares of stock *by delivery of certificates assigned in blank,* including every person who lends stock, shall, as a part of such transaction, promptly make and deliver to the buyer or borrower a bill or memorandum of such sale, agreement to sell, or loan, duly signed by the seller or lender or his agent, to which the requisite stamps shall be affixed and canceled, which bill or memorandum shall show the date of the transaction, the names of the seller and buyer, or lender and borrower, and the name and number of shares of stock, and the tax paid thereon, and in the case of a transaction made on an exchange shall bear a number upon the face thereof

> and have printed or written in ink thereon the words 'Subject to the Revenue Act of 1926, as amended, and regulations made in accordance therewith.' No more than one such bill or memorandum made by the seller or lender on any given date shall bear the same number. However, no single transaction or purchase or sale that is made upon an exchange by one member to another member shall be required to be evidenced by more than one stamped memorandum."

As appears from the above provision of the Regulations the Federal authorities refer to a memorandum of sale as an instrument delivered by the seller to the buyer. Furthermore the instrument is described as a "bill or memorandum of sale," just as in the case of the Florida statute.

The Florida statute imposes a tax on "memoranda of sales or deliveries." The Comptroller's construction is that this language is the equivalent of memoranda of sales or memoranda of deliveries. In other words, the Comptroller contends that both memoranda of sales and memoranda of deliveries are taxable and he claims that a receipt for a stock certficate is a memorandum of its delivery which is subject to the tax. It is submitted that this is a strained and unjustified construction. As so construed the statute would impose a tax on a receipt for a stock certificate issued by a mere bailee or a messenger or any other person who was intended to have temporary custody of the certificate.

The Federal statute is in exactly the same language as the Florida statute in this particular, including the punctuation, the Federal statute imposing a tax on "memoranda of sales or deliveries." The Federal authorities do not attempt to tax a mere receipt for stock certificates under this provision. An examination of the regulations and decisions under the Federal statute make this abundantly plain.

There has for years been a statute in the State of New York in which almost the identical language is used. Sec-

tion 270 of the Tax Law of New York includes this language:

> "all sales, or agreements to sell, or memoranda of sales and all deliveries or transfers of shares or certificates of stock * * * in any domestic or foreign association, company or corporation * * * whether made upon or shown by the books of the association, company, corporation, or trustee, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of sale or transfer, whether intermediate or final***."

In the *Opinions of the Attorney General of New York* for 1928 at page 125, a case was presented under the New York statute in which stock of a Canadian corporation owned and possessed by a person in New York had been sold to a Canadian purchaser on a Canadian exchange. The seller assigned the certificates in blank in New York for delivery to the purchaser in Canada. The certificates were then delivered to a broker in New York to complete the transaction. The Attorney General's opinion reads as follows:

> "The State Tax Commission asks my opinion as to whether stock transfer tax becomes owing when stock in a Canadian corporation, owned and possessed by a person within this State, is assigned by him in blank and delivered here to brokers for the purpose of delivery in Canada to a purchaser, pursuant to a sale previously executed upon a Canadian exchange.
>
> "In my opinion, Tax Law, section 270, does not impose a tax upon such a transaction.
>
> "It is true that the provisions of our statute taxing 'deliveries' and 'transfers' of stock are attended by some very broad phrases, and are not necessarily limited, as to any delivery or transfer which is a step to a gift or sale by International Paper Company v. State, 210 App. Div. 353, aff. 241 N. Y. 535 mem. Upon

> the present statement of facts, however, the sale having been effected in Canada previous to the delivery here, it seems that the brokers in this State perform no function other than might be performed by a messenger or common carrier, and the only true delivery is that in Canada. I am informed, and the fact is not without some slight persuasiveness, that until a few months ago it was generally assumed that there was no tax upon such transactions."

The facts of the New York case, covered by the Attorney General's opinion just quoted from, exactly fit the situation which occurs where a sale is made on the New York Stock Exchange for a Florida customer, who thereafter hands his stock to one of the appellee brokerage firms to use in making the delivery to the purchaser required to be made in New York. Just as the New York Act could not be used to levy an excise on such "delivery" of stock sent out of the State in connection with the sale made outside of the State, the "delivery" by sending stock from Florida to New York to be used in a sale delivery in that State, is not a taxable transaction under the Florida Statute. That rule and construction, applying as it does to shipments of stock to foreign States where sales have been made, following the making of such sales, would apply all the more clearly to a shipment of stock to a foreign Exchange for the purpose of having it offered for sale, and before any contract for sale or any sale had been made therefor.

It is submitted that the intent of the Florida statute is to tax only transfers, sales and agreements to sell which are made in Florida. This intent appears from the language of the statute which after imposing a tax of 10c on each $100.00 of face value of shares with par value, provides:

> "and where such shares are without par or face value, the tax shall be 10c on the transfer or sale or agreement to sell on each share."

The above quoted language clearly indicates an intention to tax only a transfer, a sale or an agreement to sell. No other transaction is specified in the language imposing the tax with respect to shares without par value and it cannot be seriously contended that other tansactions were intended to be taxable with respect to shares with par value. The additional phrases used in the first part of the paragraph, that is, memoranda or sales or deliveries, were intended to be taxed only when constituting a necessary part of a transfer, or a sale or an agreement to sell.

It is clear also that when the bill or memorandum of sale as described in the Florida statute has been duly stamped, there is no further tax due. That this construction is placed on the Federal statute appears from Article 35 of Regulations No. 71 issued by the Bureau of Internal Revenue. That article reads in part as follows:

> "*Sales or transfers not subject to tax.* — the following are examples of transactions not subject to the tax:
>
> (a) The transfer of stock pursuant to a sale, where the previous memorandum of sale has been duly stamped."

The true memorandum of sale, where the appellee brokers sell stock for a Florida customer, is the one which is made and delivered in New York in connection with a sale of stock there. Exhibt 5 to the Stipulaton of Facts (R. 79) is an example of an actual memorandum of sale which is called the "sales ticket," to which there are affixed and cancelled, the stamps required by the New York and Federal excise taxes which are levied upon the stock transfer, in connection with the making of which such memorandum or "sales ticket" is delivered in New York by the selling broker. (R. 64 and 68).

The Florida statute was construed by the State officials for nearly two years as imposing no tax under the circumstances involved in the example under consideration in this

memorandum. This appears from letters and telegrams which passed between the former Comptroller, Honorable Ernest Amos, and Messrs. Shutts & Bowen, as attorneys for one of the appellee firms, shortly after the Act became effective. (R. 26-27 and 85-91).

The interpretation placed upon a statute over a considerable period of time by administrative officers charged with its enforcement, is entitled to great weight in determining the proper construction of the statute. In *Brewster v. Gage*, 280 U. S. 327, 336, in a question arising under the Federal Revenue Acts of 1918 and 1921, the Court said:

> "It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons. *Logan v. Davis*, 233 U. S. 613, 627. *Maryland Casualty Co. v. United States*, 251 U. S. 342, 349. *Swendig v. Washington Water Power Co.*, 265 U. S. 322, 331."

From the contentions made in the Court below by counsel for Appellant, we anticipate that they will argue here that the case of *Graniteville Mfg. Co. v. Query*, 283 U. S. 376 (affirming 44 F. (2d) 64), supports their attempt to construe the third paragraph of Schedule A of the Florida statute as requiring stamps on the papers and memoranda above mentioned made in the State of Florida which make incidental reference to a foreign sale of stock.

In the Graniteville case it was held that promissory notes made by a South Carolina corporation in that State and mailed to banks outside the State, to evidence loans to be made thereon, were taxable under paragraph 4 of Schedule A of a South Carolina excise tax statute which, like the corresponding paragraph in the Florida statute, places a tax on promissory notes and other written obligations to pay money. The Court held that the tax on promissory notes was an excise levied with respect to the creation of the instruments within the State.

Counsel for the Appellant in this case will argue that the incidental papers relating to foreign stock sales are papers made within the State, and that the application in the Graniteville case given to the statute as to taxing the promissory notes should be given to the Florida statute with reference to the Florida papers and memoranda which are incidental and collateral to the foreign stock sales. It is a complete answer to that argument to point out that while the *fourth paragraph* of the statute does levy an excise on the making in Florida of promissory notes and certain other obligations to pay money, the *third paragraph* of Schedule A provides an excise tax of an entirely different character, to-wit, an excise on the transfer of property; and to call attention to the fact that the tax sought to be imposed on these incidental and collateral memoranda is conceded not to apply to more than one subject which is connected with any foreign purchase or sale of stock, and that as sought to be imposed by the Comptroller the taxability is made to depend upon the fact of a foreign sale and the value and amount of the stock sold. Moreover, in the Graniteville case the Court distinguishes the tax as there placed on the making of promissory notes, from an excise tax on a property transfer such as a sale of stocks. This is shown by the Court's opinion, where, in specifying the nature of the excise tax applied to the making of promissory notes under the fourth paragraph of Schedule A of the Act, it was said at Page 379:

> "So laid, the tax was not imposed upon property, *or upon the transfer of property*, situated beyond the jurisdiction of the state * * *."

As the Graniteville case dealt with the nature of the tax as applied to promissory notes and obligations to pay money, specified in the *fourth* paragraph of Schedule A, the case did not purport to pass upon or designate the type or nature of tax imposed by the *third* paragraph of Schedule A, relating to stock sales and transfers. For the use to which the Appellant seeks to put that authority, the decision is inapplicable.

A stock transfer tax provision of the New York State law, which for purpose of construction is the same as the third paragraph of Schedule A of the Florida Act was directly under consideration in the case of *People ex rel. Hatch v. Reardon*, 204 U. S. 152, in which the New York Appellate Division and Court of Appeals and this Court held that the tax imposed by that portion of the statute was an excise tax on the sale and transfer of property. The question was directly raised by the argument there made to the effect that the tax was a property tax. In the opinion of the case in the New York Court of Appeals (184 N. Y. 431, 77 N. E. 970) the point was discussed as follows (p. 795 of N. E. Rep.):

> "The tax, however, is not on property, but on the sale of property, or on a particular kind of contract when made within this state. The certificate, itself, is not liable for the tax, but the person selling it is. The tax is not a lien on certificates, nor on shares, which may be owned to any extent throughout the state, free from any claim under the statute in question. *It is the sale alone that gives rise to the tax, which is imposed through the command of the law to the seller to pay the tax when the contract to sell is made, and it is enforced not by levy and sale, but by civil and penal remedies against the person of the seller.*"

We, therefore, respectfully submit that the third paragraph of Schedule A of the Florida statute simply creates an excise tax upon the sale and transfer of stock, and that, as the sales and purchases of stock which the appellee brokers make on the New York and other foreign Stock Exchanges for their Florida customers, are transfers of stock not made within the State, the taxable event does not occur within her territorial jurisdiction, and that the papers incidentally referring to such purchases and sales and which Appellant calls "memoranda" of sales and of deliveries, are not subject to taxation under the Act.

POINT FOUR.

The Florida Act, if construed as contended for by the Appellant, is violative of the Constitution of the United States.

The argument made under this heading is applicable to the stated points upon which the Appellant relies, which are numbered Two to Seven, inclusive, in that those points assign as error the restraining of the tax as to the various documents above discussed. The argument here made applies directly to Appellant's Eighth and Ninth Points (R. 102), which attack the District Court's ruling that the Comptroller's construction would give the statute extra-territorial effect, and also may apply under the last three points which Appellant relies on which attack the District Court's decision on broad and general grounds.

It is the contention of the Appellees that the result of construing the statute, as contended for by the Comptroller, would render it repugnant to the First Section of Article 14 of the Amendments to the Constitution of the United States as depriving the Appellees of their liberty and property without due process of law, and by denying to them within the jurisdiction of the State of Florida the equal protection of the laws, and repugnant to the commerce clause of the United States Constitution (Article I, Section 8, Clause 3).

1. The taxation would deprive Appellees of property without due process of law. It is clearly demonstrated by the agreed facts here that all purchases and sales of stocks made by the Appellee brokers for their Florida customers take place entirely outside of the State of Florida. All steps and elements essential to the transfers are foreign to the State.

Statutes such as the Florida Act in question have been construed to have no extra-territorial effect. A similar New York Act (Section 270 of the Tax Law of New York) was given that construction.

In re. Paul's Estate, 165 N. Y. S. (Surr.) 413, (affirmed without opinion by the Appellate Division, First Department, 167 N. Y. S. 1117);

People ex rel. Hatch v. Reardon, 204 U. S. 152, affirming the Court of Appeals, 77 N. E. 970, which affirmed the Appellate Division, 97 N. Y. S. 535.

Likewise, a similar statute of South Carolina was so construed in *Graniteville Mfg. Co. v. Query, supra*, 283 U. S. 376, where it was held that the statute could not apply to promissory notes which were made and delivered outside of that State.

The Federal statute levying an excise on sales and transfers of stocks (26 USCA § 901) has been construed by the general counsel of the Bureau of Internal Revenue not to apply to sales of stock made outside of the territorial jurisdiction of the United States. In the "*Internal Revenue News*," Vol. 5, No. 11, page 15, issued by the Bureau of Internal Revenue in the month of May, 1932, there appears an article by Frank D. Strader of the Office of the General Counsel of the Bureau. Mr. Strader refers to Article 34 of the Regulations 71 and says:

> "Under the above-cited regulations the bureau has ruled that the assignment in blank and delivery of certificates of stock in Canada, where such stock is issued by a domestic corporation, is not subject to the stamp tax liability imposed by section 800, Schedule A-3, Title VIII, revenue act of 1926. There is nothing in the law or regulations that imposes the tax on the mere sale of corporate stock when the transaction is effected wholly outside of the jurisdiction of the United States. However, where the sale occurs outside of the limits of this country, but the transfer of the stock is made upon the books of the corporation in the United States, the transfer is thus brought within the jurisdiction of the United States and becomes subject to tax."

This construction, placed on these earlier kindred acts, which were models for the later Florida statute, alone would

be sufficient to require a similar construction to be given to the Florida Act. But more compelling in its effect, and controlling on the point, is the underlying principle that a state is without power to levy a property tax on property which is not within its jurisdiction, or to levy an excise tax on a taxable event which occurs outside of its territorial limits.

In this connection the District Court in its opinion rendered in this case (R. 57) said:

> "It is our opinion that all purchases and sales of stock by the plaintiff brokerage firms for their Florida customers, whether the stock is bought outright by the customer or upon a margin, are transactions entirely completed outside of the State of Florida and that any memoranda passing between the broker and the customer are not such documents as are subject to taxation in Florida. To hold such memoranda of sales made without the State to be subject to taxation would be giving the statute extra-territorial effect. People ex rel. Hatch v. Reardon, 97 N. Y. S. 535. For a state to tax property beyond its jurisdiction is a taking of property without due process of law. Frick vs. Pennsylvania, 268 U. S. 473; First Nat. Bank vs. Maine, 284 U. S. 312."

The cases cited by the District Court amply support the holding there made.

In *Frick v. Pennsylvania*, 268 U. S. 486, (October Term, 1924, No. 125), this Court said, at Page 492:

> "The Pennsylvania statute is a tax law, not an escheat law. This is made plain by its terms and by the opinion of the state court. The tax which it imposes is not a property tax, but one laid on the transfer of property on the death of the owner. This distinction is stressed by counsel for the state. But, to impose either tax, the state must have jurisdiction over the thing that is taxed; and to impose either without such jurisdiction is mere extortion, and in contravention of due process of law."

The tax there was a succession tax. It is submitted that the analogy is complete and that a death transfer tax and an excise tax on transfers of property *inter vivos* stand on the same footing with respect to the lack of power of a state to impose such tax on a foreign transfer.

In *First National Bank v. Maine,* 284 U. S. 312, among other things, it was held that an inheritance or succession tax was an excise tax which could not be imposed by more than one state. The Court there said, at Page 322:

> "We decided, pp. 488-492, that the Pennsylvania tax, in so far as it was imposed upon the transfer of tangible personality, having an actual situs in other states, was in contravention of the due process clause of the 14th Amendment. Upon a review of former decisions, it was held (1) that the exaction of a tax beyond the power of the state to impose was a taking of property in violation of the due process clause; (2) that while the tax laws of a state may reach every object which is under its jurisdiction, they cannot be given extra-territorial operation;***"

And further, at Page 328, the Court said:

> "We conclude that shares of stock, like the other intangibles, constitutionally can be subjected to a death transfer tax by one state only.
>
> "The question remains: In which state, among two or more claiming the power to impose the tax, does the taxable event occur?"

These authorities are controlling and easy of application to the present case. It must be borne in mind that under the facts in this case, with the single exception of the taxability which is claimed by Appellant for a receipt given by the brokers' Florida employees to a customer, who hands them stock to be sold and as to which transaction our contention is that no title transfer takes place, the taxability of the various documents is entirely dependent upon there being an actual sale or transfer of the stock outside of the State. Also, the Appellant concedes that where a sale is made outside of the State for a Florida customer in the manner shown

here, only one of the various documents which he contends are taxable shall bear the tax. The tax is one the amount of which would be measured by the foreign transfer. These circumstances show beyond any question that the effect of the taxation, if it could be imposed in the manner contended for by the Appellant, would be the levying of an excise tax by the State of Florida upon a taxable event occurring outside of its territorial limits, and a consequent taking of property of the Appellees beyond the power of the State and, therefore, without due process of law.

2. The tax levied under such circumstances would deprive Appellees of liberty without due process of law. The Constitution guarantees to Appellees the right, privilege and liberty to be free in the enjoyment of their faculties, including the right to pursue their businesses and to enter into all contracts which may be proper, necessary and essential to their carrying out to a successful conclusion their proper business purposes. This liberty will be denied them if these papers made in Florida, which have incidental and collateral reference to contracts made for their customers, outside of the State of Florida for the sale of stock, and to extra-territorial sales and transfers of stock made on their behalf, are construed to be subject to the excise tax under the Florida Act.

Allgeyer v. Louisiana, 165 U. S. 578;
St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346.

In the Louisiana and Arkansas cases it was attempted through a state statute to levy a tribute on the making of certain insurance contracts outside of those states. Here the State of Florida through the interpretation of its stamp tax law as placed thereon by its Comptroller acting as an administrative board, is attempting to receive a tribute upon contracts made outside of this State for the sale of stock, and upon actual sales and transfers of stock which are made and completed outside of this State. The holding in *Allgeyer v. Louisiana, supra*, is conclusive on the point that any incidental communications or memoranda

which may be written or used in the State, which are merely incidental and collateral to the foreign transaction, cannot be made the object of taxation by virtue of and because of the foreign transaction.

The Court in the Allgeyer case, in the opinion by Mr. Justice Holmes, said at Page 592:

> "In the privilege of pursuing an ordinary calling or trade and of acquiring, holding, and selling property must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the state may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the state as contained in the statutes, yet the power does not and cannot extend to prohibiting the citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the state, and which are also to be performed outside of such jurisdiction; nor can the state legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is the subject of the insurance may at the time when such insurance attaches be within the limits of the state. The mere fact that a citizen may be within the limits of a particular state does not prevent his making a contract outside its limits while he himself remains within it. *Milliken v. Pratt*, 125 Mass. 374 (28 Am. Rep. 241); *Tildon v. Blair*, 88 U. S. 21 Wall 241 (22: 632). The contract in this case was thus made. It was a valid contract, made outside of the state, to be performed outside of the state, although the subject was property temporarily within the state. As the contract was valid in the place where made and where it was to be performed, the party to the contract upon whom is devolved the right or duty to send the notification in order that the insurance provided for by the contract may attach to the property specified in the shipment mentioned in the notice, must

have the liberty to do that act and to give that notification within the limits of the state, any prohibition of the state statute to the contrary notwithstanding. *The giving of the notice is a mere collateral matter; it is not the contract itself, but is an act performed pursuant to a valid contract which the state had no right or jurisdiction to prevent its citizens from making outside the limits of the state.*

"* * * Any act of the state legislature which should prevent the entering into such a contract, or the mailing within the state of Louisiana of such a notification as is mentioned in this case, is an improper and illegal interference with the conduct of the citizen, although residing in Louisiana, in his right to contract and to carry out the terms of a contract validly entered into outside and beyond the jurisdiction of the state."

The state restriction sought to be imposed in the Allgeyer case was in the form of a penalty in a round sum termed a fine. The later case cited, *St. Louis Cotton Compress Co. v. Arkansas, supra,* established that such a restriction cannot be imposed in the form of a tax.

It is apparent, and a point to be noted in connection with this case, that no question of state regulation or police power control of matters or actions of persons is raised or urged as a basis for the appellant's contention here respecting the Florida Act.

3. The tax would constitute a burden on interstate commerce. The business of the Appellees, as disclosed in this case, constitutes commerce between the states. The tax is sought to be imposed on the messages which are transmitted by private telegraph wire between the New York offices of the firms and their Florida branch offices.

The leased private wire is a facility which, if used through the public telegraphic systems, could not be subjected to such taxation.

Western Union Teleg. Co. v. Foster, 247 U. S. 105.

We submit that where the Appellee brokerage firms, through the facilities in question, secure the transmission between states of quotations, and other messages and communications with reference to their business, such information and messages are an indispensable part of their business and constitute commerce between the states to the same extent that ordinary messages by telephone and telegraph companies are so classed.

Furthermore, the shipment of stocks, as is done with relation to a portion of the business of the firms conducted for their Florida customers, is interstate commerce. We take this position notwithstanding the case of *Ware & Leland v. Mobile County*, 209 U. S. 405, and the cases which follow it, in which it was held that such brokerage business with respect to trades in cotton and other commodity futures, was not interstate commerce.

In a search which has been exhaustive, but which we concede is by no means complete, we have not found any case in point deciding whether or not such brokerage business on trades of stocks listed on Stock Exchanges is interstate commerce. A clear distinction, however, which exists between the case of trading in stocks and the case of trading in commodity futures is that in the former the trade or contract made on the floor of the Exchange is always followed promptly by actual delivery, and there is no dealing in or assignment of the contract for the delivery of the stock, whereas, in the case of the commodity futures, the subject of trade, as a practical matter, is the contract itself. It is true that the commodity futures contracts call for delivery at a future date, but the delivery called for is usually to take place at a distant date, and the practice is to trade in the contracts themselves, by purchase, sale or assignment thereof, an unlimited number of times before the time set for the actual delivery of the commodity.

4. The Florida Act, as applied to the circumstances of this case, is unconstitutional and void by reason of the excessive penalties provided therein.

Under an analogous statute shown to have such an effect, this contention was successfully made in the case of *Ex Parte Young*, 209 U. S. 123, and the statute was held to be unconstitutional and void in that case on that ground. The case concerned railroad rates, and the penalty provided for disobedience of the Act was a $5,000.00 fine, or imprisonment in the state prison not exceeding five years, or both. While the amount of the fine and the length of imprisonment provided as penalties in that case were greater than the ones provided in the Florida Act, the difference is one only of degree, and we submit that the amount of the fine and the length of the imprisonment penalty provided for in the Florida Act are more than sufficiently grave to bring this case squarely within the principle as thus announced in *Ex Parte Young*, since in the usual course of business of each of the Appellee firms, the employees of their Florida offices could become subject to daily fines exceeding, by conservative estimate, more than $20,000.00, and imprisonment sentences totalling more than ten years for each day's infringement.

POINT FIVE.

The Florida Act, if construed as contended for by the Appellant, is violative of the Constitution of the State of Florida.

The argument made under this heading is applicable to those points upon which the Appellant relies, which are specified above in the opening of the argument under our Point Four.

We submit that if the construction contended for by the Appellant is given to the statute, it is thereby rendered unconstitutional under the Constitution of the State of Florida in the respects set forth below:

1. The Act is a violation of the due process provision of the Florida Constitution (Section 12 of the Declaration of Rights of Florida), which guarantees that no person shall be deprived of life, liberty or property without due process of law. What has been said above in POINT FOUR in discussing that question with reference to the Federal Constitution is equally applicable here.

2. The Act thus construed is void as being in conflict with the First Section of Article IX of the Constitution of Florida, which provides:

> "The Legislature shall provide for a uniform and equal rate of taxation,****; and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal,***."

To levy and collect the taxes on the construction contended for by the Comptroller, where the only basis for such taxes are the contracts, sales and transfers which are made and take place outside the State of Florida, by requiring the placing of stamps on incidental and collateral written records of such foreign transfers, is the levying of a property tax on such records, since there is no transaction within the State of Florida subject to an excise tax in that connection. The

title of the Act is not controlling as to the nature of the tax.

St. Louis Cotton Compress Co. v. Arkansas, supra, 260 U. S. 346.

The tax sought to be collected, however, is one the amount of which is not based upon any intrinsic or other actual value of the "memorandum" or "record" or paper on which it is sought to enforce the placing of stamps, but is a tax which, as to its amount, is gauged by the kind and number of shares or certificates of stock involved in a sale made outside the State of Florida, and to which the writing or paper in question incidentally makes reference. No further argument or explanation is necessary to show that such a method of valuation of a paper or writing is not a just valuation of the property taxed, and is in utter disregard of the constitutional guaranty of equal rate of taxation. That this is true is shown by *People ex rel. Hatch v. Reardon, supra,* where in the opinions of the New York Courts dealing with that case, the Appellate Division (97 N. Y. S. 535, 541) and the Court of Appeals (77 N. E. Rep. 970, 974), in distinguishing the stock transfer tax there from a property tax, took the view, that as a property tax it would be violative of the State constitutional guaranty of equal rate of taxation by reason of the valuation basis shown above.

The constitutional provisions for equal rate of taxation, and for just valuation by which the same is brought about are mandatory, and the disregard of such requirements is, under the decisions of the Florida Court, a violation of the State Constitution.

Jordan v. Duval County, 68 Fla. 48, 66 Sou. Rep. 298.
Graham v. West Tampa, 71 Fla. 605, 71 Sou. Rep. 926.
Sparkman v. State, 71 Fla. 210, 71 Sou. Rep. 34.
Camp Rhosphate Co. v. Allen, 77 Fla. 341, 81 Sou. Rep. 503.

Louisville & N. R. Co. v. Amos, 98 Fla. 350, 123 Sou. Rep. 745.

Walter C. Hardesty, Inc. v. Town of Holly Hill, 100 Fla. 1130, 131 Sou. Rep. 134.

3. The statute, if construed as contended for by the Appellant, likewise violates the Sixteenth Section of Article III of the Florida Constitution, by which it is provided that Acts of the Legislature shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title. The title of the Act is as follows:

> "An Act Levying and Imposing an Excise Tax on Documents to Raise Revenue for the Support of the State Government; and Prescribing Penalties for Failure to Pay Said Tax."

It appears from the title that the tax thereby imposed is described as an excise tax. The application of this Act to sales and transfers made in the State of Florida is the levying of an excise tax as distinguished from property tax. The Act thus imposes an excise tax on the making of certain documents and, by the third paragraph of its Schedule A, on certain transfers.

Since the State is without power to levy an excise tax on a transfer or transaction which does not take place within its territorial limits, a tax imposed on some incidental feature of such a foreign transfer must be a property tax, if it is a tax at all. To construe the third paragraph of Schedule A of the Act to levy such a property tax, while other paragraphs of the Schedule patently impose an excise tax, results in the Act embracing a plurality of subjects, in violation of the provision mentioned. In that event, as shown by the decision of the Florida Court, in *Smith v. Chase, Sheriff*, 91 Fla. 1044, 109 Sou. Rep. 94, the State constitutional provision is further violated by the consequent failure of the title of the Act to disclose the subject thereof.

These local questions and questions of state constitutionality are proper subjects for consideration and determination in this case, notwithstanding that the initial basis of its

jurisdictional position as a case for a statutory Court, under Section 266 of the Judicial Code, is the question of Federal constitutionality upon which the statute is attacked.

Louisville & Nashville Railroad Co. v. Garrett, supra, 231 U. S. 298, 303, 304.

LAST POINT.

In conclusion, it is submitted that the decree of the District Court should be affirmed.

Respectfully submitted,

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